

The Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

VIVENDI S.A. and VIVENDI HOLDING I
CORP.,

Plaintiffs,

v.

T-MOBILE USA, INC.; T-MOBILE
DEUTSCHLAND GMBH; T-MOBILE
INTERNATIONAL AG; DEUTSCHE
TELEKOM AG; and ZYGMUNT SOLORZ-
ZAK,

Defendants.

No. CV6-1524 JLR

**DECLARATION OF ULI
KUEHBACHER IN SUPPORT
OF MOTION TO DISMISS THE
THIRD AMENDED
COMPLAINT**

I, ULI KUEHBACHER, hereby declare as follows:

1. I am Executive Vice President of Deutsche Telekom AG ("Deutsche Telekom") and, until December 2006, I was General Counsel for T-Mobile International AG. I am also a member of the Supervisory Board of Polska Telefonia Cyfrowa Sp. z o.o. ("PTC"). I submit this declaration in support of the Motion of Deutsche Telekom, T-Mobile Deutschland GmbH, T-Mobile International AG, and T-Mobile USA, Inc. (the "DT Defendants") to Dismiss the Third Amended Complaint. This declaration is based on my personal knowledge or on information that I have obtained for the purpose of preparing this declaration.

1 2. I am familiar with the organizational structure and business activities of
2 Deutsche Telekom and its subsidiaries—including the DT Defendants—and have knowledge
3 of the dispute surrounding ownership of certain shares in the Polish telecommunications
4 company, PTC, that is the basis of this lawsuit. I am also familiar with the allegations that
5 Vivendi S.A. (“Vivendi”) and Vivendi Holding I Corp. (“Vivendi Holding”) (collectively,
6 “Plaintiffs”) make in their Third Amended Complaint.
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8 **I. THE DT DEFENDANTS’ ORGANIZATIONAL STRUCTURE**

9 3. Deutsche Telekom, T-Mobile International AG, and T-Mobile Deutschland
10 GmbH (the “German DT Defendants”) are all organized under the laws of Germany with their
11 principal places of business in Germany. The German DT Defendants are all separate
12 corporate entities that maintain separate books and records.
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14 4. Deutsche Telekom is the parent company of a group of corporate entities,
15 including the other DT Defendants. Deutsche Telekom owns subsidiaries that provide fixed-
16 line and mobile telecommunications services.

17 5. T-Mobile International AG is the general partner of T-Mobile International AG
18 & Co. KG, which is a holding company for the subsidiaries of Deutsche Telekom that provide
19 mobile telecommunications services. T-Mobile International AG is wholly owned by T-
20 Mobile International Holding GmbH. T-Mobile International Holding GmbH is a holding
21 company that is in turn wholly owned by Deutsche Telekom and that is organized under the
22 laws of Germany with its principal place of business in Germany.
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24 6. T-Mobile International Holding GmbH owns all but one share of T-Mobile
25 International AG & Co. KG, which is also organized under the laws of Germany with its
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1 principal place of business in Germany. T-Mobile International AG owns one share of T-
2 Mobile International AG & Co. KG.

3 7. T-Mobile International AG & Co. KG wholly owns T-Mobile Deutschland
4 GmbH, which was previously known as DeTe Mobil Deutsche Telekom Mobilnet GmbH. T-
5 Mobile International AG & Co. KG also wholly owns T-Mobile Global Holding GmbH,
6 which is organized under the laws of Germany with its principal place of business in
7 Germany.
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9 8. T-Mobile Global Holding GmbH wholly owns T-Mobile USA.

10 9. T-Mobile Deutschland GmbH provides mobile telecommunications services in
11 Germany. T-Mobile Deutschland GmbH and T-Mobile USA are affiliates and do not have a
12 parent-subsidiary relationship.
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14 10. T-Mobile USA does not hold any stock or other interest in PTC.

15 **II. GERMAN DT DEFENDANTS' CONTACTS WITH WASHINGTON STATE**
16 **AND THE UNITED STATES**

17 11. To my knowledge, none of the German DT Defendants is incorporated or
18 registered to do business in the State of Washington, or any other U.S. State.

19 12. To my knowledge, none of the German DT Defendants owns or rents any
20 property in the State of Washington, or any other U.S. state.

21 13. To my knowledge, the German DT Defendants do not sell their
22 telecommunications products or services in the State of Washington, or any U.S. State.

23 14. To my knowledge, the German DT Defendants do not advertise their
24 telecommunications products or services in the State of Washington, or any U.S. State.
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1 **III. THE GERMAN DT DEFENDANTS' RELATIONSHIP WITH T-MOBILE USA**

2 15. Like each of the German DT Defendants, T-Mobile USA is a separate
3 corporate entity. To my knowledge, T-Mobile USA and the German DT Defendants do not
4 hold joint boards of directors' meetings, and they file separate tax returns.

5 16. While certain members of the German DT Defendants' boards of directors
6 (called "supervisory boards") sit on T-Mobile USA's board, they do so as T-Mobile USA
7 directors and not as representatives of the German DT Defendants.

8 17. T-Mobile USA operates a separate wireless telecommunications network from
9 that of the German DT Defendants. The wireless devices sold by the German DT Defendants
10 and T-Mobile USA operate using a Global System of Mobile Communications ("GSM")
11 technology platform. European and U.S. GSM frequencies are different, however, and thus
12 the GSM networks on which the German DT Defendants' and T-Mobile USA's products and
13 services operate are separate and distinct.
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16 **IV. LITIGATION CONCERNING THE DISPUTED PTC SHARES**

17 18. Over the last eight years, Vivendi, Elektrim S.A. ("Elektrim"), Telco (a joint
18 venture between Vivendi and Elektrim), and Deutsche Telekom (and certain of its German
19 subsidiaries) have been involved in numerous arbitral and national court proceedings in
20 Europe concerning the ownership of certain shares in PTC originally held by Elektrim. These
21 proceedings have taken place in Poland, Austria, France, Germany, the United Kingdom, and
22 Switzerland. T-Mobile USA has not been a party to any of these proceedings. Many of these
23 proceedings are still ongoing.
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25 19. As described in paragraph 60 of the Third Amended Complaint, on November
26 26, 2004, an arbitral tribunal in Vienna, Austria issued an award finding, among other things,
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1 that the attempted transfer by Elektrim of its shares in PTC to Telco was ineffective and that
2 Elektrim remained the owner of the disputed shares at all material times (“the November 2004
3 Award”).

4 **A. Proceedings in Poland**

5 20. On or about December 16, 2004, Elektrim filed an action in Poland seeking
6 recognition of the November 2004 Award. On February 2, 2005, the Warsaw Regional Court
7 issued a decision recognizing the November 2004 Award. An English translation of that
8 decision is attached hereto as Exhibit A.
9

10 21. Telco appealed the Warsaw Regional Court’s decision to the Appellate Court
11 in Warsaw, 1st Civil Division. On March 29, 2006, the Appellate Court dismissed the appeal.
12 An English translation of the Appellate Court’s decision is attached hereto as Exhibit B.
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14 22. Telco appealed the court of appeals’s decision to the Supreme Court of Poland.
15 On January 18, 2007, the Polish Supreme Court vacated the lower-court decisions confirming
16 the November 2004 Award on procedural grounds. The Supreme Court remanded the case to
17 the Warsaw Regional Court where the recognition proceedings have now recommenced. An
18 English translation of the Supreme Court decision is attached as Exhibit C.

19 23. In addition to the recognition proceedings related to the November 2004
20 Award, Vivendi and Telco have also filed more than a dozen legal proceedings in Poland
21 relating to the PTC dispute. Some, but not all, of the actions that Vivendi and Telco have
22 filed in Poland are described below.
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24 a. Following the November 2004 Award, Telco filed suit in Warsaw
25 Regional Court seeking a declaration that it was the owner of the PTC shares. During
26 those proceedings, Telco made an *ex parte* application requesting that PTC be
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1 enjoined from making any changes to PTC's internal share register. An English
2 translation of Telco's Request for Interim Measures in that action is attached hereto as
3 Exhibit D.

4 b. On June 20, 2006, after the Warsaw Regional Court issued the *ex parte*
5 injunction, the Warsaw Appellate Court reversed, holding that the November 2004
6 Award barred Telco's claim to the shares. An English translation of the Appellate
7 Court's decision is attached hereto as Exhibit E. Telco continues to seek a declaration
8 from the Polish courts that it is the owner of the PTC shares.

9 c. Vivendi (or Telco) has also initiated many additional proceedings in
10 Poland, including, but not limited to, proceedings: to declare invalid T-Mobile
11 Deutschland GmbH's acquisition of the PTC shares; to list Telco as the owner of the
12 disputed PTC shares in the National Court Register, the official Polish registry of
13 shareholders; to prohibit PTC from distributing profits; to prohibit Elektrim's
14 representatives on the PTC Management and Supervisory Boards from acting on
15 behalf of PTC; to prohibit T-Mobile Deutschland GmbH and Elektrim from exercising
16 shareholder rights with regard to the disputed PTC shares; to restrain Elektrim from
17 transferring or taking any action with regard to the disputed shares; to order Elektrim
18 to return the PTC shares or their value to Telco; for damages against PTC Supervisory
19 Board and Management Board members and PTC shareholders; and to prohibit
20 Elektrim from transferring funds to its creditors.

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22 **B. Proceedings in Austria**

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24 24. Vivendi, through Telco, sought to annul the November 2004 Award in Austria.
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26 On December 20, 2005, the Commercial Court in Vienna partially annulled the November
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1 2004 Award. On October 10, 2006, the Higher Regional Court of Vienna reversed the
2 Commercial Court's partial annulment and dismissed Telco's action. Telco was ordered to
3 pay the costs and attorney's fees of the other parties to the appeal proceedings, including T-
4 Mobile Deutschland GmbH. An English translation of this decision is attached hereto as
5 Exhibit F.

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7 25. On December 18, 2006, the Austrian Supreme Court issued a decision
8 affirming the appellate court's dismissal of the annulment action and order for Telco to pay
9 costs and attorney's fees. An English translation of the Supreme Court's decision is attached
10 hereto as Exhibit G.

11 **C. Proceedings in France**

12 26. On or about April 26, 2005, Vivendi served Deutsche Telekom and T-Mobile
13 International AG & Co. KG with a civil summons to appear before the Commercial Court of
14 Paris. An English translation of the Summons is attached hereto as Exhibit H.

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16 27. Vivendi alleges that the defendants violated French law by breaking off
17 settlement talks in 2003 and 2004 in bad faith and colluding with Elektrim. Among other
18 things, Vivendi seeks damages in the amount of its alleged investment in PTC (1,881,601,161
19 euros). An English translation of Vivendi's brief submitted to the French court is attached
20 hereto as Exhibit I.

21 **D. Proceedings in Germany**

22 28. Vivendi filed suit in Hamburg, Germany, requesting that the court prohibit
23 Deutsche Telekom from making any statements to the effect that it owns the PTC shares. The
24 Hamburg Regional Court rejected Vivendi's claim in a decision dated November 7, 2006. An
25 English translation of that decision is attached hereto as Exhibit J.
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1 **E. Proceedings in Switzerland**

2 29. In April 2006, Vivendi commenced another arbitration, this time before the
3 International Court of Arbitration of the International Chamber of Commerce in a proceeding
4 sited in Geneva, Switzerland. The respondents in that arbitration are, among others, Deutsche
5 Telekom, T-Mobile International AG & Co. KG, T-Mobile Deutschland GmbH, Elektrim,
6 and PTC. In the Swiss arbitration, Vivendi claims to be the owner of the disputed PTC shares
7 based on a purported oral agreement. Vivendi seeks specific performance of that agreement
8 and/or damages. Again, Vivendi claims that it is entitled to regain the disputed PTC shares or
9 its lost investment.
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11 **V. LOCATION OF RELEVANT DOCUMENTS AND WITNESSES**

12 30. To my knowledge, the DT Defendants' documents and witnesses relevant to
13 this lawsuit, which I understand accuses the DT Defendants of violating U.S. law during and
14 after the Second and Third Vienna Arbitrations (as defined in Plaintiffs' complaint), are
15 located outside the United States.
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17 31. To my knowledge, all of the documents possessed by any DT Defendant that
18 are relevant to discussions with Vivendi to settle the PTC dispute are located in Germany and
19 Poland. To my knowledge, no such documents would be located in the United States because
20 T-Mobile USA had no involvement in the settlement discussions that form the basis of this
21 lawsuit.
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23 32. To my knowledge, all of the documents possessed by any DT Defendant that
24 are relevant to the Second and Third Vienna Arbitrations are located in Germany and Poland.
25 To my knowledge, no such documents would be located in the United States because T-
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1 Mobile USA had no involvement in the Second or Third Vienna Arbitrations or any of the
2 legal proceedings regarding ownership of the PTC shares.

3 33. To my knowledge, all of the documents possessed by any DT Defendant that
4 would concern Elektrim or Mr. Solorz Zak, if they existed, would be located in Germany and
5 Poland. To my knowledge, no such documents would be located in the United States because
6 T-Mobile USA had no involvement in the PTC dispute.
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8 34. To my knowledge, all of the documents possessed by any DT Defendant
9 regarding the three press releases that Plaintiffs allege in this lawsuit were misleading would
10 be in Germany, where the press releases were drafted and released.

11 35. To my knowledge, all of the witnesses likely to have knowledge of any
12 settlement communications with Vivendi, the Second and Third Vienna Arbitrations,
13 communications with Elektrim or Solorz, and the press releases identified by Plaintiffs in
14 their complaint would be located in Germany, Poland, or elsewhere in Europe, but not in the
15 United States.
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17 36. If this case were to be tried before this Court, the DT Defendants' witnesses
18 would need to travel to Seattle from Germany, Poland and elsewhere in Europe.

19 37. I understand that Plaintiffs base their complaint in part on communications
20 allegedly made by Mr. Peter Golob to representatives of Vivendi. Mr. Golob was never, and
21 is not now, an employee of any of the DT Defendants, though he has acted as an independent
22 consultant in the past. To my knowledge, he currently resides in London, England.
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24 38. I understand that Plaintiffs also base their complaint in part on a
25 communication allegedly made by Mr. Thomas Winkler, former CFO of T-Mobile
26 International AG, to representatives of Vivendi. As of January 31, 2007, Mr. Winkler is no
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1 longer the CFO of T-Mobile International AG. To my knowledge, he currently resides in
2 London, England.

3 39. I understand that Plaintiffs also base their complaint in part on a
4 communication allegedly made by Mr. Kai-Uwe Ricke, the former CEO of Deutsche
5 Telekom, to Mr. Jean-Bernard Levy, the CEO of Vivendi. Mr. Ricke is no longer an officer
6 or employee of Deutsche Telekom. To my knowledge, he currently resides in Bonn,
7 Germany.
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9 I declare under penalty of perjury under the laws of the United States that the
10 foregoing is true and correct.
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12 EXECUTED this 25th day of September, 2007.

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Uli Kuehbacher

CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2007, I filed this Declaration of Uli Kuehbacher in Support of Motion to Dismiss the Second Amended Complaint on the CM/ECF system, which will send notification of such filing to the following persons:

Robert E. Rohde: brohde@rohdelaw.com

Lanny J. Davis: ldavis@orrick.com

Garrett Rasmussen: grasmussen@orrick.com

DATED this 26th day of September, 2007.

Davis Wright Tremaine LLP
Attorneys for Defendants

By: /s/ Steven P. Caplow

Steven P. Caplow, WSBA #19843
Davis Wright Tremaine LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
Telephone: (206) 628-7513
Fax: (206) 628-7699
E-mail: stevenaplow@dwt.com